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FILED

SEP 14 1993

OFFICE OF THE CLERK

No. 92-2025

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN DOE, PETITIONER

v.

R. JAMES WOOLSEY, DIRECTOR OF CENTRAL INTELLIGENCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1. Whether a Central Intelligence Agency employee has a property entitlement, protected by the Fifth Amendment, to continued employment with the CIA.

2. Whether the CIA's individualized consideration of security concerns raised by petitioner's conduct violated his right to equal protection under the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-26a) is reported at 981 F.2d 1316. The opinion of the district court (Pet. App. 28a-47a) is reported at 769 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. A petition for rehearing was denied on March 23, 1993. Pet. App. 7a. The petition for a writ of certiorari was filed on June 21, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Central Intelligence Agency (CIA) hired petitioner as a clerk-typist in 1973, and in 1980 promoted him to an undercover position.[1] Pet. App. 9a. In 1982, the Director of Central Intelligence discharged petitioner from employment with the CIA, deeming the termination "necessary and advisable in the interests of the United States" pursuant to Section 102(c) of the National Security Act." C.A. App. 104. Section 102(c), 50 U.S.C. 403(c), provides:

> Notwithstanding the provisions of section 7501 of title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government * * *.

2. Petitioner brought this action against the Director of Central Intelligence in district court, seeking injunctive and declaratory relief. Petitioner alleged that his dismissal was prompted by his admission that he is a homosexual, and violated the Administrative Procedure Act, 5 U.S.C. 706, because the decision to fire him was arbitrary, capricious, and

[1] Petitioner has proceeded in this case under the pseudonym "John Doe" because his status as an undercover CIA employee cannot be publicly acknowledged. See C.A. App. 47; *Doe* v. *Casey*, 796 F.2d 1508, 1512 n.2 (D.C. Cir. 1986), aff'd in part and rev'd in part *sub nom. Webster* v. *Doe*, 486 U.S. 592 (1988).

an abuse of discretion, and was reached without adhering to procedures required by law and by CIA regulations. In addition, petitioner contended that his termination denied him equal protection of the laws and deprived him, without due process, of a property interest in continued employment with the CIA. Pet. App. 9a-10a.

Without reaching petitioner's constitutional claims, the district court held that the CIA violated petitioner's rights by dismissing him without following the procedures afforded by CIA regulations. *Doe* v. *Casey*, 601 F. Supp. 581 (D.D.C. 1985). The court ordered the CIA to reinstate petitioner to administrative leave, with pay, until he was terminated in accordance with procedures set forth in CIA regulations.[2] *Id.* at 586-590.

On petitioner's first appeal, the court of appeals reversed the district court's determination that petitioner's discharge violated CIA regulations. *Doe* v. *Casey*, 796 F.2d 1508, 1519-1520 (D.C. Cir. 1986). The court held that the regulations permitted the Director to fire a CIA employee under Section 102(c) without any process whatsoever. The court rejected, however, the government's contention that Section 102(c) completely precluded judicial review of petitioner's termination. 796 F.2d at 1513-1519. Because the termination did not violate the CIA regulations, the court explained that petitioner "must look to section 102(c) itself or to the Constitution" to support his claims. 796 F.2d at 1520. In particular, the court held that if the Director had invoked Section 102(c) because the CIA had a blanket policy against employ-

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[2] Petitioner has remained on paid leave from 1985 to the present pursuant to the district court's order.

ing homosexuals, the Agency would have to justify why such a policy was "necessary or advisable in the interests of the United States." *Id.* at 1522.

This Court granted the government's petition for a writ of certiorari and reversed the court of appeals' ruling that a court could review whether a termination ordered by the Director under Section 102(c) was in fact "necessary or advisable in the interests of the United States." *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988). The Court explained that "the language and structure of § 102(c) indicate that Congress meant to commit individual employee discharges to the Director's discretion," 486 U.S. at 601, and that such decisions are thus "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and are not reviewable under the APA. The Court also held, however, that Section 102(c) does not preclude a court from reviewing a "colorable constitutional claim" arising out of a Section 102(c) dismissal, and remanded the case for further proceedings on petitioner's constitutional claims. 486 U.S. at 604-605.

3. a. On remand, the district court held that petitioner did not have a colorable equal protection claim because the Director's actions were rationally related to legitimate governmental interests. Pet. App. 29a-32a. During discovery, the CIA submitted a redacted section of a memorandum from the Agency's Office of Security that recommended petitioner's discharge (C.A. App. 103), as well as then-Director William Casey's subsequent finding that the termination was necessary and advisable in the interests of the United States (*id.* at 104). The memorandum explained that petitioner had intentionally hidden his homosexual activity from the Agency for more than five years, although he knew that it was a significant

security concern; that he had demonstrated a "pronounced reluctance" to reveal information about his past conduct, and in particular information regarding his sexual partners, and therefore "might be susceptible to threats of exposure directed toward his past, present or future partners who are not open about their homosexual activities"; and that his activities threatened to draw attention to the sensitive CIA cover facility where he was employed in an undercover capacity. *Id.* at 103. On the basis of these facts, the Office of Security concluded that petitioner "[could] not be trusted" and posed an "unacceptable and unnecessary" security risk to the Agency. *Ibid.* After examining the record, the district court agreed that petitioner's termination was based on the fact that the CIA considered his conduct to be a threat to national security. Pet. App. 30a. The court concluded that termination based on security concerns related to petitioner's homosexual conduct did not violate his equal protection rights. *Id.* at 30a-32a.

The district court also held, however, that petitioner had a property interest, protected by the Due Process Clause of the Fifth Amendment, in continued employment with the CIA. The court conceded that petitioner had no entitlement to continued employment under either Section 102(c) or the Agency's regulations. Pet. App. 33a-34a. Instead, the court found that petitioner had a cognizable property interest in continued employment based on "[a]gency-fostered understandings."[3] *Id.* at 35a. The court held

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[3] As the court of appeals noted, Pet. App. 11a-12a, the district court based its holding on two sources for such "understandings." First, it pointed to statements in a CIA

that these "understandings" created a property interest in continued employment, and that the Agency could not deprive petitioner of that interest without affording him at least notice and a hearing at which he would have a chance to rebut the allegation that he posed a security threat to the Agency. *Id.* at 35a-36a.

b. The court of appeals reversed the district court's ruling that petitioner had a property interest in his CIA employment. The court held that a CIA employee can have no such interest in light of the Director's authority under Section 102(c) to discharge any Agency employee in his discretion. Pet. App. 13a-14a. The court explained that "[t]he law is clear that if a statute relegates termination to the discretion of the Director, no property entitlement exists." *Id.* at 14a.

The court of appeals also affirmed the district court's rejection of petitioner's equal protection claim, holding that the record before the district court "supports the conclusion that the agency is entitled to summary judgment" on that claim. Pet.

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booklet for incoming personnel that the Agency has the authority to discharge any employee "who, in the judgment of the Director, has failed to carry out his duties responsibly and effectively," and that "[e]xcept for the continuing responsibility to avoid disclosure of information affecting national security, Agency employees are under no formal restrictions beyond those governing the conduct of Federal workers as a whole." *Id.* at 35a; see C.A. App. 29. Second, the court relied on petitioner's affidavit stating that at the beginning of his employment, unidentified CIA officials told him (as summarized by the court) "that once his probationary period was completed, he would continue to be employed as long as his services were needed, his work was well done, he complied with security regulations, and protected classified information from unauthorized disclosure." Pet. App. 35a; see C.A. App. 13.

App. 17a. Assuming, without deciding, that a blanket policy against homosexuals might support an equal protection claim, the court held that petitioner had not pointed to sufficient evidence to raise a genuine issue of material fact as to the existence of any such policy. *Id.* at 17a-18a.

In addition, the court concluded that even if there were an issue as to the existence of a blanket policy, the record in this case established that "Doe's termination resulted not from a blanket policy but from the CIA's individualized determination that his own case represented a threat to the national security mission of the Agency." Pet. App. 20a. Noting that petitioner had "point[ed] to nothing that would suggest" that the reasons for discharge set forth in the CIA's memorandum were pretextual, the court held that "enough undisputed evidence exists in the record both to support summary judgment for the CIA on the equal protection claim, and to support the District Court's conclusion that 'the discharge [was] rationally related to the legitimate government security interest in collecting foreign intelligence and protecting the nation's secrets.'" *Id.* at 21a, quoting *id.* at 31a.[4]

[4] Judge Edwards filed a separate opinion concurring in the court's due process ruling and concurring in the judgment on the equal protection claim. Pet. App. 23a. He wrote separately to make clear his view that the equal protection claim should have been dismissed because there was "absolutely nothing in the record that plausibly suggests" the existence of a "blanket [CIA] policy against homosexuals," and because petitioner had "pointed to nothing in the record that might reasonably be viewed to suggest that he suffered disparate treatment in his disciplinary assessment by virtue of his homosexuality." *Ibid.*

ARGUMENT

1. Petitioner renews in this Court (Pet. 14-18) his original contention that the language of Section 102(c) itself gives him an expectation of continued employment with the CIA that is protected as a property interest under the Fifth Amendment. As all the courts to consider this case—including this Court—have now held, however, Section 102(c) has precisely the opposite effect.

The district court correctly held that Section 102(c) confers no property right to continued employment because the "[t]he intent of the statute is that employees of the CIA should serve at the pleasure of the Director." Pet. App. 33a. The court of appeals likewise held that because Section 102(c) commits employee terminations to the discretion of the Director, "no property entitlement exists," any statements by Agency employees or other "agency fostered understandings" to the contrary notwithstanding.[5] Pet. App. 13a-14a.

Judge Randolph also joined the court's opinion on the due process claim but filed a separate opinion (Pet. App. 24a-26a) in which he expressed the view that rejection of petitioner's equal protection claim should rest solely on the ground that "Doe was fired, not because of any blanket CIA policy, but for decidedly individualized reasons." *Id.* at 26a.

[5] Petitioner mounts no separate challenge to the court of appeals' conclusion that "agency fostered understandings" could not give rise to a due process claim if Section 102(c) itself creates no protectable property interest in continued employment. Pet. App. 13a-14a; see Pet. 15. That conclusion is plainly correct. As the court of appeals recognized, Pet. App. 13a-14a, the principle that mutual understandings may create such an interest is "subject to the unquestioned exception" that no such understanding "can contravene the intent of the legislature

Most important, recognition of any property right would be inconsistent with this Court's square holding, in its previous consideration of this case, that Section 102(c) commits decisions to terminate an employee "in the interests of the United States" to the Director's largely unreviewable discretion. *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988). In its prior decision, this Court ruled that Section 102(c) does *not* furnish an objective standard for when a CIA employee may be discharged. 486 U.S. at 600. The Court noted that Section 102(c) allows termination "whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States' (emphasis added), not simply when the dismissal *is* necessary or advisable to those interests," *ibid.*, and explained that because this statutory standard "exudes deference to the Director," it forecloses any meaningful judicial review of the termination decision under the APA. *Ibid.* The Court thus concluded that "the language and structure of § 102(c) indicate that Congress meant to commit individual employee discharges to the Director's discretion." 486 U.S. at 601. As the court of appeals recognized, Pet. App. 13a-14a, that conclusion forecloses petitioner's argument (Pet. 17-18) that Section 102(c)

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regarding the employment entitlements that can be conferred." *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). Thus, "mutual understandings and customs [can] not create a property interest for purposes of due process when they are contrary to the express provisions of regulations and statutes." Pet. App. 14a (quoting *Baden* v. *Koch*, 638 F.2d 486, 492 (2d Cir. 1980)). See also, *e.g.*, *Bishop* v. *Wood*, 426 U.S. 341, 345 n.8 (1976) (fact that employee held position at will and pleasure of city "necessarily establishes that he had *no* property interest" in continued employment).

establishes an "objective standard" for termination sufficient to create a protectable expectation of continued employment.

Petitioner contends (Pet. 15-18) that a construction of Section 102(c) that precludes recognition of a property right in continued CIA employment conflicts with this Court's decisions in *Service* v. *Dulles*, 354 U.S. 363 (1957), and *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). Petitioner points out that in *Service* this Court held that the Secretary of State was bound to follow his own regulations in reaching employment decisions, despite a governing statute similar in its terms to Section 102(c), and he argues that that holding would have been erroneous if the statutory language had created a fully discretionary employment regime.[6] With respect to *Arnett*, petitioner argues (Pet. 16-17) that Section 102(c) is no more vague or general than the statutory command at issue there that civil servants be terminated "only for such cause as will promote the efficiency of the [civil] service," 5 U.S.C. 7501(a) (1976), which the opinions in *Arnett* agreed created some protectable property

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[6] The decision in *Service* was based in part on the Court's observation that "[a]lthough Congress was advised in unmistakable terms that the Secretary had seen fit to limit by regulations the discretion conferred upon him, * * * it continued to re-enact the [governing statute] without change for several succeeding years." 354 U.S. at 380. There is, of course, no similar consideration in this case. Moreover, petitioner properly refrains from renewing any argument based on the CIA's own regulations. As the court of appeals held in its previous opinion in this case, those regulations fully preserve the discretion conferred on the Director under Section 102(c). *Doe* v. *Casey*, 796 F.2d at 1519-1520; see also *Webster* v. *Doe*, 486 U.S. at 602 n.7.

interest in federal employment. See 416 U.S. at 151-152, 166.

These arguments cannot be reconciled with this Court's previous decision in this case. Petitioner attempts (Pet. 17-18) to distinguish that decision on the ground that "[t]he question whether a statute provides an objective standard to guide the exercise of agency discretion is distinct from the question whether the exercise of that discretion is committed by law to the agency such that review under the APA is unavailable." If so, however, the distinction is one without a meaningful difference. The argument that the Agency's statutory discretion could be sufficiently bounded to create a property right of constitutional significance, but at the same time so unbounded as to provide "no basis on which a reviewing court could properly assess an Agency termination decision," 486 U.S. at 600, is singularly unpersuasive.

2. a. Petitioner contends (Pet. 19) that a "blanket ban on homosexuals" in the CIA would violate equal protection principles. But the court of appeals assumed, for purposes of its decision, that such a policy would offend the Constitution, and held that the district court had nonetheless properly granted summary judgment because the record was wholly devoid of evidence that any such policy existed or was ever applied to petitioner. Pet. App. 17a-18a, 20a; *id.* at 23a (Edwards, J.); *id.* at 26a (Randolph, J.). The CIA has not attempted to justify any general policy against homosexual employees, for the simple reason that it has no such policy; to the contrary, as the court of appeals held, the Agency "has come forward with abundant evidence of the nonexistence of any such blanket policy." *Id.* at 19a. In addition, as the

court of appeals unanimously concluded, the record in this case demonstrates conclusively that petitioner was fired not because of any general policy, but based on the individualized security concerns raised by his specific conduct. *Id.* at 20a-21a, 23a, 26a. Petitioner's attempt to engage the courts in constitutional review of non-existent policies that bear no relation to the facts of his case was correctly rejected by the courts below, and it does not warrant review by this Court.

b. Petitioner argues (Pet. 20-22) that even if his termination was based on an individualized review of his case, that review was constitutionally improper. Although petitioner posits "numerous questions of disparate treatment" (Pet. 21-22), those questions are entirely speculative; he does not and cannot cite any support for them in the record of this case. What the record does document is the Agency's thorough review of legitimate security concerns involving petitioner's individual conduct.[7]

The memorandum prepared by the Agency's Office of Security concluded that petitioner's concern for the privacy of his sexual partners might make him susceptible to threats of exposure directed not toward him, but toward them; that petitioner's involvement in homosexual activity might lead to undesired publicity

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[7] Petitioner's constitutional claims were considered on remand pursuant to this Court's decision in *Webster* v. *Doe*, 486 U.S. at 603-605, that such claims are generally subject to judicial review even in cases arising under Section 102(c). We note that where, as here, a termination decision is shown to be based on an individualized determination that the terminated employee poses a security risk, judicial review of that underlying determination may raise significant issues in light of this Court's decision in *Department of Navy* v. *Egan*, 484 U.S. 518, 526-530 (1988).

affecting the existence and operations of the "sensitive CIA cover facility" where he was employed in an undercover position; and that petitioner's long-term concealment of activities that he knew would be of security concern to the agency raised concerns that he might not report other sensitive information "if it [did] not suit his personal desires or [might] prove embarrassing for him to do so." C.A. App. 103; see also Pet. App. 20a-21a. As the court of appeals concluded, *id.* at 21a, that sort of documented consideration of legitimate, individualized security concerns was sufficient to support the district court's rejection of petitioner's equal protection claim. See *USIA* v. *Krc*, 989 F.2d 1211, 1214-1216 (D.C. Cir. 1993); compare *Padula* v. *Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) (risk of blackmail to protect partners); *High Tech Gays* v. *Defense Industrial Security Clearance Office*, 895 F.2d 563, 578 & n.13 (9th Cir. 1990) ("targeting" of homosexuals by foreign intelligence services); cf. *United States* v. *Lallemand*, 989 F.2d 936, 939-940 (7th Cir. 1993) (married homosexual may be "vulnerable victim" for purposes of sentence enhancement under federal guidelines).

c. Finally, petitioner asserts (Pet. 21) that the decision below conflicts with *Dubbs* v. *CIA*, 866 F.2d 1114, 1119-1120 (9th Cir. 1989). The plaintiff in *Dubbs* alleged in part that the CIA viewed homosexual conduct as a *per se* negative factor in considering security clearances, while treating heterosexual conduct as a negative factor only when it reflected a lack of judgment or discretion or created a potential for exploitation. See *id.* at 1119. The court of appeals did not reach the factual or legal merits of that claim. *Id.* at 1120; see *High Tech Gays*, 895 F.2d at 572 n.8. It held only that a disparate treatment claim could not

be dismissed solely on the ground that *any* individualized consideration of an employee's sexual orientation would automatically satisfy all applicable constitutional requirements, and remanded for further proceedings on the plaintiff's claim.

The ruling in *Dubbs* is inapposite here. The district court in this case did not hold that any evidence of individualized consideration sufficed to defeat petitioner's constitutional claims. Rather, the court was presented with evidence of the Agency's particularized concerns about petitioner, and it held that those concerns were sufficient to justify petitioner's discharge. Pet. App. 31a. The court of appeals carefully reviewed the record and sustained that judgment. *Id.* at 20a-21a, 23a, 26a. The decision below therefore presents no conflict with *Dubbs*, and warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1993